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Nos. 80-415 and 80-1239

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Appellant,

v.

WILLIAM M. GIBBONS, Trustee, *et al.*,
Appellees.

Consolidated Appeals From The United States District Court For The Northern District of Illinois And From The United States Court Of Appeals For The Seventh Circuit

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REPLY BRIEF FOR APPELLANT

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v.

WILLIAM M. GIBBONS, Trustee, *et al.*,

Appellees.

REPLY BRIEF FOR APPELLANT

On September 26, 1981, appellees William M. Gibbons as Trustee of the Chicago, Rock Island & Pacific Railroad Company; Continental Illinois National Bank and Trust Company of Chicago as Indenture Trustee; the First National Bank of Chicago as Indenture Trustee; and Henry Crown, *et al.*, [hereinafter, "Rock Island Appellees"] filed a brief in opposition to the two consolidated appeals by appellant Railway Labor Executives' Association [hereinafter, "RLEA"]. In their lengthy brief, the Rock Island appellees raised several arguments to which appellant RLEA believes a response should be made. This reply brief is respectfully submitted to address those points.

I. In Asserting That The Notice Of Appeal Filed By RLEA In No. 80-415 Was Dissolved By A Subsequent Motion To Vacate, The Rock Island Appellees Fail To Realize That The Filing Of That Notice Of Appeal Was Governed By 28 U.S.C. § 2101(a) And By The Rules Of This Court Which Were In Effect On June 11, 1980, And Not By The Federal Rules Of Appellate Procedure

After unsuccessfully arguing to the Court of Appeals (J.A. 211a) and to this Court (Sup. Ct. No. 80-704) that RLEA's appeal in No. 80-415 required the appeal from the October 1980 order to be brought

directly to this Court notwithstanding Section 124(a) of the Rock Island Transition and Employees Assistance Act [hereinafter, "RITA"], as amended, 45 U.S.C. § 1018(a), the Rock Island appellees have changed tracks, and now assert that appellant never filed a timely notice of appeal to this Court in No. 80-415. Appellees support their changed position by relying upon Rule 4(a)(4), Fed. R. App. P., to assert that appellant's timely notice of appeal which was filed two (2) days after the issuance of the preliminary injunction of June 9, 1980, was "nullified and dissolved" by a subsequent motion by the United States to vacate the June 9th order. R.I. Appellees' Br. at 2-3. Appellant RLEA respectfully submits that the Rock Island appellees should not have altered their position on the validity of the notice of appeal filed by RLEA in No. 80-415 for their earlier conclusion was correct; RLEA's notice was timely when filed (28 U.S.C. § 2101(a)) and its continued validity was not affected by the Federal Rules of Appellate Procedure since those rules do not govern appeals to this Court.

The preliminary injunction at issue in No. 80-415 was granted on June 9, 1980 (J.A. 160a), but was not entered until June 10, 1980. J.A. 9a-10a. On June 11, 1980, RLEA filed with the District Court a notice of appeal to this Court from that order. J.A. 10a. Nine (9) days after that appeal was noted, the United States asked the District Court to vacate the preliminary injunction (J.A. 10a), and RLEA supported that request. *Id.* On that same day, the District Court denied the government's request. J.A. 183a. RLEA did not file a subsequent notice of appeal, but rather, proceeded to docket its earlier noted appeal.

RLEA appealed to this Court under 28 U.S.C. § 1252, and not to the court of appeals. Consequently, the timeliness of its appeal is to be governed by 28 U.S.C. § 2101(a), and by Rule 11.3 of the Rules of this Court as it existed on June 11, 1980.[1] *See*, Rule 10.1, Rules of the Supreme Court. Rule 11.3, as it read on June 11, 1980, provided that an appeal in a case such as that involved in No. 80-415, "shall be in time when the notice of appeal . . . is filed with the Clerk of the

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[1] On April 14, 1980, this Court adopted various amendments to its rules, including amendments to Rule 11. 48 U.S.L.W. 3663 (1980). However, those amendments were not effective until June 30, 1980. *Id.*

appropriate court within the time allowed by law for taking such appeal and the case is docketed within the time provided" in the Rules. Section 2101(a) of title 28 provided the time for taking such an appeal and stated in pertinent part that: "A direct appeal to the Supreme Court from any decision under section 1252 . . . of this title . . . shall be taken within thirty days after the entry of the interlocutory . . . order . . . ." Even though neither Rule 11.3 (as it existed on June 11, 1980 or as it reads today) nor Section 2101(a) provides that a "notice of appeal filed before the disposition [of a timely motion to vacate] . . . shall have no effect" (Rule 4(a)(4), Fed. R. App. P.), the Rock Island appellees nevertheless assert that the notice of appeal filed by RLEA on June 11, 1980, was nullified by the subsequently filed motion to vacate. RLEA disagrees.

Under both the Federal Rules of Appellate Procedure, and the Rules of this Court prior to 1979, a timely filed motion to alter or to amend a judgment did not nullify an earlier filed notice of appeal; rather, the prior notice of appeal transferred jurisdiction over the case to the appellate court. *See*, 9 MOORE'S FEDERAL PRACTICE. ¶ 203.11 (1980 Ed.). Also, a timely filed motion to alter or to amend a judgment did not disolve actions taken prior to that motion, but subsequent to entry of the judgment; rather, the motion simply "tolled the time to appeal" from the original judgment. *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 177 (1944). Those principles governed RLEA's appeal to this Court in June 1980, and thus, the subsequently filed motion to vacate did not dissolve the earlier notice of appeal by RLEA since the District Court no longer had "jurisdiction" over its order of June 9, 1980. [2]

While it is correct that Rule 4, Fed. R. App. P., was amended in 1979 so as to provide that: "A notice of appeal filed before the disposition [of a timely motion to alter or to amend] . . . shall have no

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[2] Even though on June 20, 1980, the District Court technically lacked jurisdiction over its June 9th order, it was accepted procedure that the District Court should first be asked to reconsider its earlier ruling. If it denied that request, as here, nothing else needed to be done; if it were inclined to grant the request, a request would then have to be made to the appellate court to remand for that purpose. *See*, 9 MOORE'S FEDERAL PRACTICE, *supra*, ¶ 203.11 at pp. 3-48 to 3-50.

effect" (Rule 4(a)(4), Fed. R. App. P.), that amendment does not affect this case for several reasons. First, as stated before, Rule 4(a)(4) does not apply to this case. Second, Rule 11.3 of the Rules of this Court as it existed on June 11, 1980 (and even as it now reads), does not contain a similar provision; moreover, when the rationale behind the 1979 amendments to Rule 4 of the Federal Rules of Appellate Procedure is analyzed, it would be improper to construe Rule 11.3 in a similar vein.

Prior to the 1979 amendments to the Federal Rules of Appellate Procedure, an appellant had to take certain positive steps under Rule 3, Fed. R. App. P., to docket an appeal in a court of appeals. In 1979, however, Rule 3 was amended in part to shift to the courts of appeals control over the early stages of an appeal.[3] The amendments to Rule 3, Fed. R. App. P., have the effect of making the docketing of the appeal a ministerial function of the District Court Clerk. The modifications to Rule 3 had an impact on Rule 4, for the Advisory Committee Note to the 1979 amendments to Rule 4(a), Fed. R. App. P., makes clear that Rule 4(a)(4) and its nullification provision were proposed in part because of the charges to Rule 3 so as to avoid "wasted efforts" from the premature docketing of an appeal which may be obviated by a ruling on a subsequently filed motion to alter the judgment. *See*, 9 MOORE'S FEDERAL PRACTICE, *supra*, ¶ 204.01[4] at pp. 4-9 to 4-10. That same consideration does not apply to an appeal to this Court because the docketing of an appeal is far from a ministerial act, and surely will not be made unless the parties consider that an earlier noted appeal is still alive.

II. By Asserting That The Availability Of A Tucker Act Remedy Does Not Preclude The Enjoining Of The Immediate Implementation Of The Employee Assistance Program Mandated By RITA, The Rock Island Appellees Fail To Acknowledge The Full Impact Of That Remedy Upon Their Claims That RITA Infringes Upon Their Rights Under The Constitution

Although recognizing that Section 124(c) of RITA, as amended, 45 U.S.C. § 1018(c), removes any question as to the availability of a Tucker Act remedy[4] in this case, the Rock Island appellees still argue

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[3] *See*, 9 MOORE'S FEDERAL PRACTICE, *supra*, ¶ 203.01[8].

[4] 28 U.S.C. §§1346(a), 1491.

that the District Court properly enjoined preliminarily the implementation of an Act which Congress has twice declared to be essential to the public interest. Appellees continue to support the injunction in this case because, in their opinion, the Tucker Act "does not provide the Government with blanket authority to violate constitutional rights simply because the injured party may have an action for damages under the Act." R.I. Appellees' Br. at 61. In making that argument, however, appellees fail to recognize the full import of the Tucker Act on the case at bar, for that remedy precludes as a matter of law any finding that the assailed provisions of RITA could effect an *unconstitutional* taking of private property for a public purpose. Moreover, the availability of that remedy effectively eliminates a finding of irreparable harm which is necessary before an Act of Congress can be enjoined on non-"Taking Clause" constitutional grounds as advanced by the Rock Island appellees in their brief to this Court.

The only ground upon which the District Court based its preliminary injunction of October 1980, and, hence, the only ground upon which it can be asserted that the lower court exercised its discretion, was upon its conclusion that the Act, "as amended and re-enacted by the Staggers Rail Act [of 1980, Pub. L. No. 96-448,] effects an unconstitutional taking of private property in violation of the rights" of the Rock Island appellees. J.A. 207a. But that conclusion is erroneous as a matter of law because it is premised upon the mistaken assumption that the Fifth Amendment's Taking Clause [5] requires that property owners be compensated *before* a taking may occur.

This Court has consistently held that there is no such guarantee in the Taking Clause. *E.g., Hurley, v. Kincaid,* 285 U.S. 95, 104 (1932). All that the Taking Clause requies is that there be a "reasonable, certain and adequate provision for obtaining compensation" at the time of the taking (*e.g., Cherokee Nation* v. *Southern Kansas Ry.*, 135 U.S. 641, 659 (1890)), and this Court has consistently held that the Tucker Act provides such an adequate means to obtain compensation. *E.g., Dames & Moore* v. *Regan,* Sup. Ct. No. 80-2078, decided July 2, 1981, slip op. at 30-31; *Regional Rail Reorganization Act*

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[5] The Taking Clause provides as follows: "[N] or shall private property be taken for public use without just compensation."

Cases [hereinafter, "*Rail Act Cases*"], 419 U.S. 102, 125-27 (1974). Consequently, since Congress has made that Act available to the Rock Island appellees, no unconstitutional (*i.e.*, uncompensated) taking can be held to be required by the assailed portions of RITA. And thus, an injunction premised upon the Taking Clause cannot validly be issued to enjoin implementation of the employee protection program in RITA.[6]

Relying upon *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 584-85 (1952), the Rock Island appellees contend that, notwithstanding the Tucker Act, an injunction may be issued to enjoin preliminarily a taking where the property owners will be irreparably harmed by a seizure without advance payment of compensation. R.I. Appellees' Br. at 62-63. Appellant RLEA respectfully submits, however, that appellees' reliance upon *Sawyer* is misplaced, for as this Court explained in rejecting an analogous contention in the *Rail Act Cases*, 419 U.S. at 127 n.16, *Sawyer* is inapposite.

Before the Tucker Act can be found to give a remedy for the taking of private property for public use, the taking of the property must have been Government action; *i.e.*, it must have been authorized. *Rail Act Cases*, 419 U.S. at 127 n.16. Congress obviously has the power to "authorize the taking of private property for public use" (*Youngstown Sheet & Tube Co.* v. *Sawyer*, *supra*, 343 U.S. at 588), and thus, it is clear that the question of authorization will not be at issue in this case if Sections 106 and 110 of RITA are subsequently held to have effectuated a taking. However, in the *Sawyer* case the question of authorization was very much at issue, and it was for that reason that this Court could not find as a matter of law (as it can in this case) that the Tucker Act satisfied the compensation portion of the Taking Clause. *Rail Act Cases*, 419 U.S. at 127 n.16.

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[6] The Rock Island appellees assert that under RLEA's approach to the Taking Clause, no taking, however onerous, could ever be enjoined so long as Congress did not withdraw the Tucker Act remedy. R.I. Appellees' Br. at 62-65. Appellees' argument, however, ignores the fact that other constitutional guarantees also limit Congress' range of action. Moreover, as explained below, only takings authorized by Congress or by other powers enumerated in the Constitution, are protected by the Tucker Act remedy.

Besides precluding a finding of an unconstitutional taking under the Taking Clause, the availability of a Tucker Act remedy in this case also precludes a finding that the Rock Island appellees can be irreparably harmed, as they assert they will be by an immediate implementation of Sections 106 and 110 of RITA, assuming *arguendo* that those provisions are constitutionally infirm for some non-Taking Clause reason. According to the District Court, the irreparable harm which it found will accrue to the Rock Island appellees if Sections 106 and 110 of RITA are implemented, stems from the fact that the "brooding omnipresence of a potential liability representing a significant percentage of the total assets" will distort any liquidation plan and "will totally halt the liquidation [of the estate] for the long period consumed by the appellate process, with irreparable injury to the already long-suffering creditors." J.A. 207a. A Tucker Act remedy, appellant RLEA respectfully submits, makes that potential harm insufficient to stall and frustrate the will of Congress.[7] Moreover, when the facts of this case are examined, it becomes clear that it is the injunction at bar which is actually harming the Rock Island creditors.[8]

Far from removing the "brooding omnipresence" of a large potential liability, the injunction in this case has actually delayed the resolution of that potential liability. If the Act had been implemented immediately as Congress directed, the taking issue, or any other issue which the Rock Island appellees believed was involved, could have been presented by now to the proper forum for resolution. However, almost a year and-a-half after RITA was enacted, the taking issue in particular is not even ripe for resolution. In the meantime, the District

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[7] As this Court explained in *Hurley* v. *Kincaid*, *supra*, 285 U.S. at 104 n.3:

> Even where the remedy at law is less clear and adequate, where large public interests are concerned and the issuance of an injunction may seriously embarrass the accomplishment of important governmental ends, a court of equity acts with caution and only upon clear showing that its intervention is necessary in order to prevent irreparable injury. . . .

[8] Appellant RLEA again asserts that the standing of certain appellees to challenge Sections 106 and 110 of RITA is subject to question. *See*, Appellant's Br. at 27 n.13. When it is realized that the present balance sheets of the estate show that the shareholders have a negative balance (J.A. 329a), it becomes unnecessary to examine the impact of RITA on the shareholders.

Court has authorized the Trustee not to file a plan of liquidation until the validity of Sections 106 and 110 of RITA are resolved. R.I. Appellees' Br. at 63 n.29. And, even though the estate has a substantial amount of liquid assets (J.A. 328a), with additional funds being received from the sale of Rock Island assets, the court has authorized the Trustee to defer virtually all administrative debts from the operation period of reorganization until the validity of Sections 106 and 110 of RITA are resolved. Ruling of October 15, 1981 on Petition by RLEA for Immediate Payment of Administrative Expense (Vacation Pay).

There is, however, no need for such continued deferral or delay in formulating a plan of liquidation because the estate can be liquidated now on the assumption that the employee protective provisions of RITA are valid. In the meantime, a Tucker Act claim can be prosecuted to determine the validity of that program. If that suit is eventually successful, a result which appellant submits will not be achieved, the creditors who were not able to be paid from the present assets can then receive their due from the proceeds of any Tucker Act recovery. As this court has explained before, "the temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury." *Sampson* v. *Murray*, 415 U.S. 61, 90 (1974). That same reasoning eliminates any claim of irreparable injury to Rock Island creditors in this case.

III. Contrary To The Assertions Of The Rock Island Appellees, RITA Did Not Impose A Retroactive, New Liability Upon The Rock Island Estate Since The Estate Had And Still Has A Preexisting Obligation To Aid Its Employees Survive The Economic Hardships Caused By The Demise Of The Rock Island

Asserting that appellant and the federal appellees are mistaken in arguing that the employee assistance provisions of RITA conferred a benefit upon the estate by limiting a potentially larger obligation to Rock Island employees, the Rock Island appellees insist that the assailed provisions of RITA actually imposed a retroactive and new liability upon the estate. R.I. Appellees' Br. at 28-34. Appellant RLEA respectfully submits that it is the Rock Island appellees who are mistaken on this point for when Congress transferred to the District Court the jurisdiction to authorize the abandonment of Rock Island lines, Congress conditioned that authority by providing that in

authorizing any abandonment under that provision, "the court shall require the carrier to provide a fair arrangement at least as protective of the interests of employees as that required under [49 U.S.C. §11347] . . . ." Section 17(a), Milwaukee Railroad Restructuring Act [hereinafter, "MRRA"], 45 U.S.C. § 915(a). That obligation existed when the Rock Island reorganization court declared the debtor to be unreorganizable on January 25, 1980,[9] and it was that obligation which Congress believed it was compromising when it passed Sections 106 and 110 of RITA shortly before the reorganization court authorized the abandonment of the debtor on June 2, 1980.

Almost five years before the current Rock Island was incorporated in 1947, this Court informed the Interstate Commerce Commission [hereinafter, "ICC" or "Commission"] that the Commission was in error when it concluded that it did not have the discretion under the abandonment provisions of the Interstate Commerce Act to impose employee protective provisions as a condition of any abandonment authorization. *ICC* v. *Railway Labor Executives' Association*, 315 U.S. 373 (1942). Thereafter, the Commission began to routinely impose employee protective conditions in abandonments as an exercise of its discretion. *E.g.*, *Chicago, B.&Q.R.—Abandonment*, 257 I.C.C. 700 (1944).

However, the ICC soon developed an exception to the routine application of employee protective provisions and it enunciated that policy in *Chicago, Attica & Southern R.—Abandonment*, 261 I.C.C. 646 (1946), where it stated:

> Facts and circumstances in various abandonment proposals presented to us vary widely in the situations involved. These situations fall into general groups, (1) abandonment of entire properties by carriers which are no longer able to continue the struggle for survival because of highway competition or other conditions depriving them of sufficient means of livelihood; (2) partial abandonments by generally unprosperous carriers in the effort to reduce expenses and thereby preserve service to the public on their remaining lines; and (3) abandonment of main

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[9] Appellant RLEA unsuccessfully challenged the decision to liquidate. *In re Chicago, R.I. & P.R.*, 7th Cir. No. 80-1353, decided February 11, 1981, (unpublished) (J.A. 377a), *cert. denied*, Sup. Ct. No. 80-1899 (October 5, 1981).

> lines, branch lines, or parts of lines by carriers, not in *extremis*, where abandonment is warranted and desirable as a benefit to the transportation system, but, in the language of the court, results also in a private benefit for the railroad in the form of savings realized by discontinuing uneconomic service.

261 I.C.C. at 651. On balance, the Commission concluded, employee protection should not be imposed as an exercise of its discretion in groups 1 and 2, but would be imposed routinely in group 3 situations. *Id.* at 652. That policy was further explained in *Okmulgee Northern Ry.—Abandonment*, 320 I.C.C 637, 645 (1964) (emphasis added), in which the Commission stated:

> In our opinion, the imposition of protective conditions in proceedings such as these [entire line abandonment involving seven employees], where a carrier proposes to abandon its entire line of railroad normally is not warranted, and would not serve, *in most instances*, to strengthen the transportation system within the contemplation of the national transportation policy. *A departure from this principle in particular cases must be supported by clear and convincing evidence*. . . .

Prior to 1976, the ICC had further developed the policy it had enunciated in *Chicago, Attica & Southern, supra*, drawing three exceptions to its "entire line abandonment" policy. Two of those exceptions are set forth by the Rock Island appellees at note 17, page 31 of their brief and need not be repeated here. The third exception, however, is not mentioned by those appellees, and it bears materially on the case at bar. All of the entire line abandonment cases cited by the Rock Island appellees involved small railroads employing less than 500 people. *E.g., Rutland Ry.—Abandonment*, 317 I.C.C. 393 (1962) (489 employees), *aff'd, Brotherhood of Locomotive Engineers* v. *United States*, 217 F. Supp. 98 (N.D. Ohio 1963); *Tennessee Central Ry.—Abandonment*, 333 I.C.C. 443 (1968) (334 employees affected). However, in those cases in which the Commission was faced with an application of the *Chicago, Attica & Southern* policy to carriers with large work forces, the ICC declined to follow that practice, and instead concluded that employee protection in some form should be imposed. *Penn Central Transportation Co.—Reorganization*, 347 I.C.C. 45, 92 (1973); *Central R. of N.J.—Abandonment*, 342 I.C.C. 227, 300-02 (1972). Indeed, in the *Penn Central* case the ICC expressly rejected the argument that it should

exercise its discretion so as to permit the "wholesale separation" of employees without adequate compensation. *Penn Central Transp. Co., supra,* 347 I.C.C. at 92.

In 1976, however, Congress amended the abandonment provisions of the Interstate Commerce Act and it added in what is now 49 U.S.C. § 10903(b)(2), the requirements that whenever the Commission authorizes an abandonment it issue a certificate, and that:

> Each such certificate which is issued by the Commission shall contain provisions for the protection of the interest of employees. Such provisions shall be at least as beneficial to such interests as provisions established pursuant to section 5(2)(f) of this Act and pursuant to section 405 of the Rail Passenger Service Act (45 U.S.C. 565).

Section 802, Railroad Revitalization and Regulatory Reform Act of 1976 [hereinafter, "4R Act"], Pub. L. No. 94-210. When Congress passed the MRRA in November 1979, and by Section 17(a) of that Act transferred to the Rock Island reorganization court the authority which the ICC had previously enjoyed under 49 U.S.C. § 10903 to authorize abandonments, Congress stated in its Conference Report (H. Rpt. No. 96-583, 96th Cong., 1st Sess. at 27 (1979)) that the "Conference substitute intends to make no change in existing law as it affects employee protection." To effectuate that intent, Congress provided in Sections 17(a) and (b)(1) of that Act that whenever the reorganization court authorized an abandonment (§ 17(a)), or a sale or transfer (§ 17(b)(1)), the court must provide a fair arrangement to protect employees.

Even though there was no express reference to the entire line abandonment doctrine by Congress during its consideration of the MRRA, the Rock Island appellees and four courts which have considered this issue,[10] have all asserted that when the MRRA was

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[10] Two of the courts addressed this issue in the Rock Island case; *In re Chicago, R.I.& P.R.*, N.D. Ill. No. 75 B 2697, Order No. 248, *aff'd*, 7th Cir. Nos. 80-1788, *et al.*, decided October 13, 1981 (unpublished), petition for rehearing pending. Two other courts addressed this issue in the New York, Susquehanna & Western Railroad case; *In re New York, S.& W.R.*, 504 F. Supp. 851 (D.N.J. 1980), *aff'd*, 3rd Cir. Nos. 81-1121 and 81-1929, decided November 16, 1981 (attached hereto as Appendix C). The *Susquehanna* involved a Class III railroad which employed 59 people on January 1, 1980.

enacted, Congress did not intend to require employee protection in an entire line abandonment situation. Appellant respectfully submits that such an interpretation of the MRRA is not only contrary to maxims of statutory construction, but is also factually incorrect insofar as the Rock Island is concerned.

To support their erroneous construction of the MRRA, the Rock Island appellees and the lower courts rely upon a statement in the Conference Report to the 4R Act, H. Rpt. No. 94-781, 94th Cong., 2d Sess. at 218 (1976), which stated in reference to what is now 49 U.S.C. § 10903(b)(2):

> . . . (5) [The Senate bill, followed by the Conference Substitute] required employee protection no less beneficial than that established under section 5(2)(f) of the Interstate Commerce Act and section 405 of the Rail Passenger Service Act but without intention to change the policy and practice of the Commission in connection with certificates involving total termination of service by a railroad company . . . .

The last part of that quote, however, is the first and only reference to the entire line abandonment practice in the 4R Act's legislative history. *See*, 121 Cong. Rec. 38451-52 (December 4, 1975); H. Rpt. No. 94-725, 94th Cong., 1st Sess. at 76 (1975). Moreover, it is contradicted by the clear language of the statute itself. Nevertheless, the Seventh Circuit concluded in the *Rock Island* case, *supra*, n.10, and the Rock Island appellees argue here, that the language in the 4R Act Conference Report created an exception to the mandatory language in Section 17(a) of the MRRA. Appellant RLEA disagrees.

This Court has long indicated that the "starting point" in an interpretation of a statute is the "language employed by Congress." *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 337 (1979); *Andrus* v. *Allard*, 444 U.S. 51, 56 (1979). Where the language of a statute "admits of no exception[,]" it is error for a court to legislate such an exception by judicial construction. *TVA* v. *Hill*, 437 U.S. 153, 173 (1978). But that is exactly what must be done in this case to construe Section 17(a) of the MRRA as giving the Rock Island reorganization court the discretion to not impose employee protection when it authorized the abandonment of the debtor. According to the Seventh Circuit in its *Rock Island* abandonment decision: "RLEA's position [*i.e.*, that employee protection is mandatory] is certainly reflected in the language of the statute. But it is contrary to what seems so clearly to be the intent of

Congress in enacting [Section 17(a) of the MRRA]. . . ." *In re Chicago, R.I. & P.R.*, 7th Cir. Nos. 80-1788, *et al.*, decided October 13, 1981 (unpublished per Circuit Rule 35), slip op. at 8, petition for rehearing pending. The legislative history involving RITA and its Staggers Rail Act amendments shows that the court of appeals' factual statement is incorrect.

When Congress was considering legislation which eventually became RITA, the House Committee on Interstate and Foreign Commerce reported out that legislation in March 1980, and stated:

> During the period of directed service, the bankruptcy court, on January 25, 1980, ordered the Rock Island to be liquidated on the grounds it could not be reorganized. As part of the [liquidation] . . . order, the Rock Island must obtain a certificate of abandonment from the bankruptcy judge *with a fair arrangement for employees* at least as protective of the employees as required under section 11347 of Title 49 of the United States Code.

H. Rpt. No. 96-839, 96th Cong., 2d Sess. at 21 (1980) (emphasis added). The committee's statement was based upon the knowledge that it had earlier in the MRRA required the imposition of employee protection in this case. Moreover, it was premised upon that interpretation of its own intent that Congress enacted the alternative employee protective provisions of RITA, 45 U.S.C. § 1005. *Compare*, 126 Cong. Rec. S5806 (May 22, 1980) (Remarks of Sen. Kassebaum), *with*, H. Rpt. No. 96-839, *supra*, at 21-23.[11] If there were any question as to the intent of Congress in enacting the MRRA to require the imposition of employee protection in this case, that question should have been put to rest by the Conference Report of that same Congress in passing the Staggers Rail Act of 1980, where the conferees stated: "The conferees reiterate that it is the intention of Congress that employee protection be imposed in bankruptcy proceedings involving major rail carriers, for to do otherwise would be to promote liquidations, to the detriment of the employees and the

[11] RLEA acknowledges that subsequent legislative history forms a hazardous basis for devining the intent of Congress, *Andrus* v. *Shell Oil Co.*, 446 U.S. 657, 666 n.8 (1980); however, such information is instructive and is controlling, it is submitted, in a case such as this where it explains the intent of Congress *before* the issue arose on June 2, 1980.

public interest." H. Rpt. No. 96-1430, 96th Cong., 2d Sess. at 138-39 (1980).

Apparently recognizing the weakness of their statutory interpretation argument, the Rock Island appellees seek to sustain their construction of Section 17(a) of the MRRA by asserting that this Court's decision in *Brooks-Scanlon Co.* v. *Railroad Commission*, 251 U.S. 396 (1920), and its progeny, compel the conclusion that any imposition of an employee protection requirement on the Rock Island estate affronts the Fifth Amendment guarantees of the Rock Island investors to withdraw their investments from a losing enterprise. R.I. Appellees' Br. at 28-29, 33-34. [12] Appellant RLEA disagrees, for by investing in an industry engaged in interstate commerce, the Rock Island appellees must first accommodate the public interest before they withdraw their assets from that commerce. *Gibbons* v. *United States* [hereinafter, "*Gibbons* II"], 7th Cir. Nos. 79-2413, *et al.*, decided October 7, 1981, slip op. at 13; *Gibbons* v. *United States* [hereinafter, "*Gibbons* I"], 660 F.2d 225, 229 (7th Cir. 1981). The protection of the interests of employees has been declared by Congress to be necessary to the public interest in this case, Section 102 of RITA, 45 U.S.C. § 1001, [13] and thus, that interest must be accommodated as well.

The Rock Island appellees attempt to limit the extent of the estate's obligation to accommodate the public interest by asserting that at some identifiable point in time the *Brooks-Scanlon* principle

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[12] It should be noted that Order No. 248 in the Rock Island case is the only administrative or court decision adopting the Rock Island appellees' constitutional interpretation of the entire line abandonment doctrine. The Seventh Circuit did not address this issue in affirming that order.

[13] The Rock Island appellees argue that there is a basic illogic in RITA because it requires protection for only unemployed Rock Island employees. R.I. Appellees' Br. at 42-44. What appellees ignore, however, is that Sections 106 and 110 of RITA must be taken together with the "Congressionally-supported" March 4 Hiring Agreement (H. Rpt. No. 96-1430, *supra*, at 138) as providing the requisite protection for all Rock Island employees. The March 4 Agreement, contrary to appellees' allegations, was clearly entered into on the assumption that Sections 106 and 110 of RITA would be enacted to complement its provisions (H. Rpt. No. 96-839, *supra*, at 22). Because of the concessions made by labor in that agreement, more carriers were willing to acquire Rock Island lines. *See, St. Louis S.W. Ry.—Purchase*, 363 I.C.C. 323, 380 (1980).

"absolves a railroad from expanding its funds or consuming its assets in the public interest." R.I. Appellees' Br. at 25. According to those appellees, that point was reached by at least June 2, 1980, when the reorganization court authorized the abandonment of the entire Rock Island line, and thus, their argument continues, no further accommodation can be required. *Id.* at 25-26. The fallacy of that argument is that it fails to recognize the underlying rationale for delaying the withdrawal of assets from rail operations while abandonment authority is obtained. As the Seventh Circuit informed the Rock Island appellees in *Gibbons* II, slip op. at 20 (emphasis added):

> When the continuation of rail service is essential for the protection of the public interest, the courts have . . . determined that the shareholders' right to realize the value of the property *may be held in abeyance for a reasonable period while a solution, acceptable to both the public and private interests, can be devised.*

Consequently, it is only after that solution is devised and implemented that the *Brooks-Scanlon* doctrine absolves the Rock Island from further expenditures in the public interest. *Gibbons* v. *United States* [hereinafter, "*Gibbons* III"], 7th Cir. Nos. 80-2009, *et al.*, decided October 22, 1981 (unpublished), petition for rehearing pending. [14]

Our Constitution gives Congress the power to regulate interstate and foreign commerce (U.S. Const., Art. I, § 8, cl. 3), and thus, it is Congress' responsibility to devise the solution which it believes is required by the public interest. *Accord, Ecker* v. *Western Pac. R.*, 318 U.S. 448, 468 (1943). Section 17(a) of the MRRA and RITA represent the solution which Congress has devised to resolve the transportation crises caused by the demise of the Rock Island, and included in that solution is the command of Congress that the interests of Rock Island employees be protected. Just as the abandonment order did not authorize the immediate withdrawal of the estate's operating properties from rail service (*e.g.*, *Gibbons* III), so too that authorization did not absolve the estate from its obligation to protect the interests of its employees.

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[14] A copy of that decision is attached hereto as Appendix D.

IV. The Rock Island Appellees Have Not Presented Any Other Reason To Conclude That Sections 106 And 110 Of RITA Are Unconstitutional

Even though the District Court premised its October 1980 injunction in this case upon its finding that Sections 106 and 110 of RITA violated the Taking Clause, the Rock Island appellees advance a barrage of other reasons as to why this Court should conclude that the enjoined provisions of RITA are constitutionally infirm. While most of those arguments fail on their own merits once it is accepted that Sections 106 and 110 of RITA do not create new retroactive obligations for the Rock Island estate, but rather compromise a preexisting obligation, two arguments advanced by those appellees should be addressed briefly.

The Rock Island appellees assert that Section 106 of RITA violates the separation of powers doctring by usurping the powers of the judiciary. R.I. appellees' Br. at 46-47. According to those appellees, Congress has usurped the powers of the judiciary by instructing the Rock Island Reorganization Court to enforce whatever employee protection program the ICC may device in this case. Like the Act of Congress before this Court in the *Rail Act Cases*, 419 U.S. at 141-42, Section 106 does not deprive the reorganization court of its powers to resolve constitutional issues; rather, Section 106 simply directs the court to enforce a regulation of commerce in a specific manner. *Cf.*, *ICC* v. *Brimson*, 154 U.S. 447 (1894). Since the power to regulate interstate commerce is a legislative function, Section 106 cannot be viewed as a usurpation of a judicial function.

The Rock Island appellees also rely upon the Bankruptcy Clause of the Constitution (U.S. Const., Art 1, § 8, cl. 4) to assert that Sections 106 and 110 of RITA are infirm because they are non-uniform laws of bankruptcy. R.I. appellees' Br. at 50-53. Appellees' arguments on this point, however, fail to recognize that Congress, in the exercise of its Commerce Clause powers, can enact laws which affect railroads in reorganization. Moreover, those laws, as shown by Appendix E to this brief, can be specific and address a particular crisis confronting Congress. *Wilson* v. *New*, 243 U.S. 332 (1917) (upholding Pub.L. No. 252, 39 Stat. 721 (1916)). Also, when RITA is viewed side-by-side with the MRRA, it becomes clear that it is uniform within the

meaning of the Bankruptcy Clause. *Rail Act Cases*, 419 U.S. at 159 ("uniformity provision does not deny Congress power to take into account differences that exist between different parts of the country. . . .")[15]

CONCLUSION

For the reasons set forth in appellant's opening brief, and herein, and for those additional reasons to be stated at oral argument, it is respectfully submitted that the relief requested in the opening brief should be granted.

Respectfully submitted,

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Attorneys for Appellant Railway Labor Executives' Association

Date: November 25, 1981

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[15] Appellees assert (R.I. Appellees' Br. at 52) that Section 106 of RITA cannot be uniform because no similar provision was imposed upon the New York, Susquehanna & Western Railroad. *See*, note 10, *supra*. Appellant RLEA disagrees because as Congress explained in the Staggers Rail Act's Conference Report (H. Rpt. No. 96-1430, *supra* at 138-39), Congress draws a distinction between major disruptions to commerce and those caused by the demise of a railroad the size of the Susquehanna. While appellant RLEA disagrees with this distinction, it is a distinction which Congress obviously has the power to make. *E.g.*, *Wilson* v. *New*, *supra*.

APPENDIX

APPENDIX C

***In re New York, Susquehanna & Western Railroad (Appeals Of RLEA)*, 3rd Cir. Nos. 81-1121 And 81-1929, Decided November 16, 1981**

APPENDIX C

United States Court of Appeals

FOR THE THIRD CIRCUIT

Nos. 81-1121, 81-1929

In the Matter of
NEW YORK, SUSQUEHANNA AND WESTERN
RAILROAD COMPANY,

Debtor

RAILWAY LABOR EXECUTIVES' ASSOCIATION,

Appellant

Appeal From The United States District Court
For The District Of New Jersey
(D.C. No. B-76-0182 In Bankruptcy)

Argued November 12, 1981

Before: SEITZ, *Chief Judge*, GARTH, *Circuit Judge*,
and CAHN, *District Judge**

JUDGMENT ORDER

After consideration of the contentions raised by the appellant and for essentially the reasons set forth in the district court's opinion at 504 F. Supp. 851 (D.N.J. 1980), *see also In re Chicago, Rock Island & Pacific R.R.*, Nos. 80-1788, -2199, -2286 (7th Cir. Oct. 13, 1981), it is

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*Honorable Edward N. Cahn, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

ADJUDGED AND ORDERED that the judgments of the district court dated November 25, 1980 and April 14, 1981 be and the same are hereby affirmed.

Costs will be taxed against the appellant.

BY THE COURT:

/s/

Circuit Judge

Attest:

Chief Deputy Clerk

DATED: November 16, 1981

APPENDIX D

***Gibbons* v. *United States*, 7th Cir. Nos. 80-2009, 80-2455, 81-1026 and 80-2010, decided October 22, 1981 (unpublished per curiam order)**

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

ARGUED SEPTEMBER 22, 1981
October 22, 1981

Unpublished Order
Not To Be Cited Per Circuit Rule 35

Before

HON. ROBERT A. SPRECHER, *Circuit Judge*
HON. WILLIAM J. BAUER, *Circuit Judge*
HON. EDWARD DUMBAULD, Senior *District Judge**

Nos. 80-2009, 80-2455 and 81-1026

WILLIAM M. GIBBONS, as Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Respondents.

and

No. 80-2010

WILLIAM M. GIBBONS, as Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Respondents,

REGIONAL TRANSPORTATION AUTHORITY,
Party Respondent.

Administrative Review of Orders of the Insterstate Commerce Commission.

*Honorable Edward Dumbauld, Senior District Judge for the Western District of Pennsylvania, is sitting by designation.

ORDER

The Trustee, creditors and shareholders of the Chicago, Rock Island and Pacific Railroad Company (collectively the Rock Island) have sought review of four directed service orders of the Interstate Commerce Commission (ICC), issued under Sections 104, 120 and 122 of the Rock Island Railroad Transition and Employee Assistance Act, 45 U.S.C. §§ 1003, 1015, 1017 (RITA). Three of the orders relate to the compensation for the temporary use of relatively short mileage of the Rock Island's tracks by the Illinois Regional Transportation Authority and by the Wabash Valley Railroad Company. The fourth order relates to the authorization by the ICC to 16 railroads to provide temporary voluntary service on various portions of the Rock Island system.

After both sides had filed their principal briefs in this appeal, this court decided *Gibbons v. United States*, Nos. 80-1786 and 80-1858 (August 26, 1981) (*Gibbons* I), which caused the Rock Island to restructure its arguments in its reply brief. After oral argument in this appeal, the court decided *Gibbons v. United States*, Nos. 79-2413, 80-1111, 80-1383 and 80-1538 (October 7, 1981) (*Gibbons* II). On the basis of *Gibbons* I and *Gibbons* II, as well as what follows in this order, the four ICC orders are affirmed.

I

A very brief history of the Rock Island reorganization will place the current issues in some perspective. The 10,468-mile Rock Island system filed for reorganization under Section 77 of the Bankruptcy Act of 1938, 11 U.S.C. § 205, on March 17, 1975. On September 26, 1979, shortly following the commencement of a strike by the Brotherhood of Railway and Airline Clerks and the United Transportation Union, the ICC found the Rock Island to be "cashless" and ordered the Kansas City Terminal Railway Company (KCT) to provide directed service over substantially all the Rock Island lines. [1]

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[1] A cashless railroad cannot be forced to continue operating, *In re Chicago, Milwaukee, St. Paul & Pacific R.R. Co.*, 611 F.2d 662, 669 (7th Cir. 1979), but nevertheless must fulfill its common carrier obligation of providing service. *Gibbons* I, slip op. at 8; *Gibbons* II, slip op. at 14.

Until March 23, 1980, when federal subsidies ran out, the ICC directed KCT to provide federally subsidized service on the Rock Island system under the mandatory, directed rail transportation section of the Interstate Commerce Act. 49 U.S.C. § 11125. *Gibbons* II affirmed the ICC orders directing the KCT temporary service.

Between March 23 and May 31, 1980, the end of the 240-day period for directed service under Section 11125, the ICC could no longer federally subsidize directed service, so it issued permissive unsubsidized service orders to other rail carriers. The permissive orders provided that each operating carrier and the Rock Island Trustee could negotiate the terms of compensation due the Rock Island and, failing to reach agreement, the ICC would set reasonable compensation. Meanwhile on May 27, 1980, the ICC recommended to the reorganization court that the Rock Island system be abandoned except for certain specified lines which the Trustee should attempt to sell for continued rail service. On June 2, 1980, the reorganization court ordered abandonment consistent with the recommendations of the ICC.

On May 30, 1980, a few days after the ICC recommended abandonment and a few days before the reorganization court ordered abandonment, Congress enacted the Rock Island Railroad Transition and Employee Assistance Act, 45 U.S.C. §§ 1001-1018.

During the interim period of permissive unsubsidized service orders between March 23 and May 31, 1980, the ICC issued its Revised Service Order No. 1451 authorizing the St. Louis-San Francisco Railway Company (Frisco) to operate on specified Rock Island tracks in Kansas, Texas and Oklahoma. 45 C.F.R. 25402 (April 14, 1980). The Rock Island Trustee and Frisco were unable to negotiate an agreed compensation to be paid by Frisco. Upon Frisco's petition, the ICC fixed compensation at $1,250 per route mile per year, payable on a monthly basis in advance, plus 14.4% of net revenues or profit, if any. In addition, Frisco was required to provide for the security and maintenance of the Rock Island's rail properties actually utilized by Frisco in providing interim service. 363 I.C.C. 248 (1980). This so-called "Frisco compensation formula" for compensating the Rock Island for the temporary use of its lines was applied by

the ICC in most of the interim service orders, including three of the four orders challenged in this appeal. *Gibbons* I affirmed the ICC orders directing the permissive interim service and the application of the Frisco compensation formula to that service.

In both *Gibbons* I and *Gibbons* II, it was unsuccessfully argued that the mandated and permissive directed orders constituted a taking of private property without just compensation in violation of the Fifth Amendment. Rock Island now argues that in this case the ICC orders took effect *after* a total and system-wide abandonment, whereas *Gibbons* I (and *Gibbons* II also) approved ICC directed orders effective *prior* to abandonment.

II

Appeal number 80-2010 challenges Supplemental Order No. 3 to Directed Service Order No. 1437, served by the ICC on May 30, 1980, issued pursuant to Section 120 of RITA, 45 U.S.C. § 1015, and extending for two years the authorization of the Illinois Regional Transportation Authority (RTA) to provide without federal subsidization commuter service over the 40.6-mile Chicago-Joliet line owned by the Rock Island.

Section 120 of RITA provides:

> (a) In the event agreement cannot be reached between the Rock Island Railroad and any party desiring to provide commuter service, the Commission shall order directed service, for the 2-year period beginning on May 30, 1980, over any passenger commuter line of the Rock Island Railroad that was in operation on March 1, 1980, if the directed service carrier agrees to provide such service without payment under section 11125(b)(5) of Title 49. If the parties are unable to agree on compensation, the trustee of the Rock Island Railroad shall receive compensation for the property and facilities of the Rock Island Railroad on terms determined by the Commission to be reasonable.
>
> (b) Notwithstanding any other provision of law, a passenger commuter line of the Rock Island Railroad over which directed service is provided pursuant to this section may not be abandoned, and service over such line may not be discontinued, during the period of such directed service.

45 U.S.C. § 1015.

The reorganization court in its abandonment order of June 2, 1980, noted that "in entering this order, the Court is cognizant that a further order may be required with respect to passenger commuter service pursuant to Section 120 of the Rock Island Transition and Employee Assistance Act."

Pursuant to Section 120, the ICC issued Supplemental Order No. 3 to DSO 1437, authorizing the RTA to operate 40.6 miles of Rock Island commuter track for two years. The DSO provided that the RTA maintain the Rock Island line and preserve it for the Rock Island estate, and compensate it according to the Frisco formula, adjusted to apply costs and revenues of commuter service operations.

Congress has seen fit to postpone abandonment of the relatively small commuter trackage for two years. The reorganization court realized that its order of abandonment would perhaps require a separate order of abandonment covering the commuter facilities after the expiration of the two-year period. The Rock Island has not contested the power of Congress to enact Section 120 but instead has argued that the Rock Island has abandoned the commuter line and that Congress has in effect ordered the RTA not to abandon it. Congress clearly provided that "a passenger commuter line of the Rock Island . . . may not be abandoned." It may not be abandoned by either the Rock Island or by a directed service carrier such as the RTA. Thus there is no taking under the Fifth Amendment in accordance with both *Gibbons* I and *Gibbons* II.

The Rock Island next complains of the application of the Frisco formula. Section 120 gives the ICC the power to determine reasonable compensation if the parties are unable to agree on that subject. *Gibbons* I held the Frisco formula to be reasonable as applied to the RTA for the permissive directed service between March 24 and May 31, 1980. Congress intended by Section 120 of RITA that the interim compensation continue. The House Conference Report on RITA commented as to Section 120: [2]

> The Conference substitute adopts the House provision with changes to indicate that the applicability of the section is limited to passenger service and the Rock Island is to receive such

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[2] H. R. Rep. No. 96-1041, 96th Cong., 2d Sess. 33, *reprinted in* [1980] U.S. Code Cong. & Ad. News 1194.

> compensation as the Commission finds to be reasonable if the parties cannot reach agreement on compensation for the use of Rock Island properties and facilities. In determining compensation under this section it is the conferees' desire that the Commission follow standards similar to those used in determining compensation to be paid to the trustee by interim operators in previous compensation determinations.

We can only conclude that the Frisco compensation formula is reasonable as applied here.

III

Appeals numbers 80-2455 and 81-1026 challenge Directed Service Order No. 1482, served by the ICC on August 15, 1980, issued pursuant to Section 104 of RITA, 45 U.S.C. § 1003, and authorizing the Wabash Valley Railroad Company (Wabash Valley) to operate for 90 days over two segments of Rock Island track in Kansas totaling 196.4 miles.

As we have noted, a few days before the reorganization court ordered abandonment,[3] Congress enacted RITA, first finding, among other things, that

> (3) a cessation of necessary operations of the Rock Island Railroad would have serious repercussions on the economies of the States in which such railroad principally operates; and
>
> (4) premature cessation of services over lines which are the subject of pending purchase application would result in harm to the shipping public and could imperil continuation of vital commuter service.

45 U.S.C. § 1001.

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[3] It should also be noted that the reorganization abandonment order was subject to all of the recommendations of the ICC in its abandonment recommendation to the Court, wherein it contemplated a "keeping in place and attempting to sell, for a reasonable period of time, upon reasonable terms" some 30 portions of the Rock Island system "for continued rail service." Brief of Petitioners, App. G at 33. This procedure contemplated a gradual phasing of the Rock Island abandonment and not a total abandonment as of June 2, 1980.

Section 104(a) of RITA provides:

> Notwithstanding the provisions of section 11125 of Title 49, or Public Law 96-131, the Commission shall order directed service for a period of not to exceed 90 days over any line of the Rock Island Railroad if the Secretary finds and certifies to the Commission that —
>
> (1) a lack of rail service exists which cannot be resolved by a grant of interim operating authority over such line and grains or foods are ready to be shipped to market; or
>
> (2) a lack of rail service exists which cannot be resolved by a grant of interim operating authority over such line and a rail carrier, shipper, State or other interested party has expressed in writing to the Secretary an interest in purchasing, leasing, or rehabilitating the particular rail line or facility for purposes of providing rail services, and there is a reasonable expectation that such transaction will be consummated.

45 U.S.C. § 1003(a).

Pursuant to Section 104(a), the Secretary of Transportation certified the Wabash Valley as satisfying the RITA conditions, and the ICC issued Directed Service Order 1482. This DSO authorized the Wabash Valley to operate 196.4 miles of Rock Island track for 90 days. It further provided that Wabash Valley maintain the lines and facilities, and compensate Rock Island according to the Frisco formula.

Again, Congress provided the ICC with the power in Section 104(a) to authorize the Wabash Valley to operate another relatively short section of Rock Island trackage for only 90 days. The ICC abandonment recommendations, adopted by the reorganization court, contemplated a phasing out of abandonment as to certain vital continued service. The Frisco compensation, which, as we have previously observed, includes what is most important to the bankruptcy estate, that is, maintenance of the used facilities by the lessee carrier, has been provided to the Rock Island. We conclude that the application of the Frisco formula to the limited Wabash Valley situation was proper.

Finally, the Rock Island claims that the ICC failed to comply with the rulemaking procedures of the Administrative Procedure Act and

the Interstate Commerce Commission Act. Section 104(a) of RITA provides that "the Commission shall order directed service" and Section 120(a) includes the same words. The procedure for ordering directed service is lodged in 49 U.S.C. § 11125. Section 11125(a) provides that "the Commission may act without regard to subchapter II of chapter 103 of this title [Interstate Commerce Act rulemaking procedure] and subchapter II of chapter 5 of title 5 [Administrative Procedure rulemaking procedure]."

IV

Appeal number 2009 challenges Service Order No. 1473, served by the ICC on May 30, 1980. This order was issued pursuant to Section 122 of RITA, 45 U.S.C. § 1017, and authorized 16 railroads, which were willing to do so voluntarily, to use the Rock Island tracks and facilities.

Section 122(a) of RITA provides:

> The Commission may authorize any rail carrier willing to do so voluntarily to use the tracks and facilities of the Rock Island Railroad or the Milwaukee Railroad. The use of such tracks and facilities shall be under such terms of compensation as the carriers establish between themselves, or if the carriers are unable to agree, under such terms of compensation as the Commission finds to be reasonable.

45 U.S.C. § 1017(a).

Pursuant to 122(a), the ICC authorized the 16 railroads to use specified portions of Rock Island facilities, many of which had been originally made subject to continued rail service in the ICC abandonment recommendations adopted by the reorganization court in the June 2, 1980 abandonment order.

No compensation determinations have been made pursuant to SO No. 1473 and it is not clear whether the Rock Island is still pressing this claim. In any event, however, on September 21, 1981, one day before oral argument in this appeal, the ICC served a notice requesting all interested persons to file comments or provide information and argument as to "whether, and for how long, this service over Rock Island should be permitted to continue, especially where efforts are

not being made to purchase or lease the Rock Island lines" and "whether, if operating authority is continued [the Commission] should continue to prescribe the Frisco formula." In view of this development, the ICC should be permitted to proceed. If the resulting order is not satisfactory to any interested party, that order presumably could be reviewed here.

The four orders of the ICC reviewed here are affirmed.

AFFIRMED.

APPENDIX E

Ad Hoc Congressional Legislation Concerning Strikes

1. Pub. L. No. 252, 39 Stat. 721 (1916)
   Approved: September 3, 5, 1916.

   Purpose: To establish an eight-hour day for employees of carriers engaged in interstate and foreign commerce.

2. Pub. L. No. 88-108, 77 Stat. 132 (1963)
   Approved: August 28, 1963

   Purpose: To prevent changes in status quo and to establish an arbitration board to settle a labor dispute between Class I railroads and five operating brotherhoods.

3. Pub. L. No. 90-10, 81 Stat. 12 (1967)
   Approved: April 12, 1967

   Purpose: To delay for 20 days a nationwide rail strike by six shopcraft unions against most of the nation's major rail lines by extending the status quo period under Section 10 of the Railway Labor Act for those disputes.

4. Pub. L. No. 90-13, 81 Stat. 13 (1967)
   Approved: May 2, 1967

   Purpose: To amend the period established in Pub. L. No. 90-10 to further delay the strike threatened by the six shopcraft unions.

5. Pub. L. No. 90-54, 91 Stat. 122 (1967)
   Approved: July 17, 1967

   Purpose: To create a Special Board and to provide a procedure for the final disposition of the dispute between the six shopcraft unions and most of the nation's Class I carriers involved in Nos. 3 and 4, *supra*.

6. Pub. L. No. 91-203, 84 Stat. 22 (1970)
   Approved: March 4, 1970

   Purpose: To prohibit for 37 days, any strikes or lockouts with respect to a dispute between the carriers represented by the National Railway Labor Conference and four shopcraft unions.

7. Pub. L. No. 91-226, 84 Stat. 118 (1970)
   Approved: April 9, 1970

   Purpose: To settle the dispute which was the subject of Pub. L. No. 91-203 by establishing as the contract the terms of a memorandum of understanding which had been agreed to by the negotiators for all of the parties.

8. Pub. L. No. 91-541, 84 Stat. 1407 (1970)
   Approved: December 10, 1970

   Purpose: To prohibit, until March 1, 1971, any strikes or lockouts with respect to a dispute between Class I carriers and four rail unions. Also, it provided for a five percent (5%) pay increase for the employees involved.

9. Pub. L. No. 92-17, 85 Stat. 39 (1971)
   Approved: May 18, 1971

   Purpose: To prohibit until October 1, 1971, any strikes or lockouts with respect to a two-day nationwide strike precipitated by a walkout of 10,000 railway signalmen. Also, it provided for a pay increase of approximately 13.5% for the employees in the dispute.

10. Pub. L. No. 92-235, 86 Stat. 40 (1972)
    Approved: February 21, 1972
    Purpose: To provide for a procedure to end a longshoremen dispute on the West Coast docks. This measure was signed on February 21, 1972, "as a gesture" since the dispute had been resolved by the parties on February 19, 1972.

11. Pub. L. No. 93-5, 87 Stat. 5 (1973)
Approved: February 9, 1973

Purpose: To extend for 90 days the status quo provisions of the Railway Labor Act with respect to a dispute between the Penn Central Railroad and the United Transportation Union. Also, the statute provided that the Secretary of Labor was to submit to the Congress a full, comprehensive report regarding the progress of the negotiations and any recommendations for a solution. The Secretary of Transportation was also required to submit a report to Congress concerning a plan to preserve essential rail service in the Northeast.